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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public Redacted

**Public Redacted version of “Prosecution response to Mr Yekatom’s “Motion to
Dismiss Co-Perpetration Mode of Liability” (ICC-01/14-01/18-565-Red)”**

3 July 2020, ICC-01/14-01/18-576-Conf

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom

Ms Mylène Dimitri
Mr Peter Robinson

Counsel for Patrice-Edouard Ngaïssona

Mr Geert-Jan Alexander Knoops

Legal Representatives of Victims

Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Mr Paddy Craig

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. YEKATOM's motion requesting Trial Chamber V ("Chamber") to dismiss co-perpetration as a mode of liability under article 25(3)(a) of the Statute because the Confirmation Decision fails to provide adequate notice of its "constituent objective elements", and of the facts underlying those elements, should be rejected.¹ The charges comply with the statutory requirements, are sufficiently specific and YEKATOM has received adequate notice. The Confirmation Decision sets out the material facts to bring YEKATOM to trial as well as the legal characterisation of those facts (both applicable modes of liability and article 7 and 8 crimes).

2. YEKATOM conflates a form of participation set out in the Statute—co-perpetration—with a rehearsal of the Court's jurisprudence. However, when the application to the facts of the relevant form of participation, as derived from the ordinary meaning of the statutory language, is straightforward, no further elaboration is necessary. Moreover, the fact that Pre-Trial Chamber II appeared to question certain aspects of the Court's previous jurisprudence does not mean that it departed from it, or that the charges against YEKATOM are defective or provide insufficient notice.

3. Nonetheless, given the importance of the issues raised, the Prosecution requests the Chamber to confirm its understanding of the Confirmation Decision and that YEKATOM stands charged with direct co-perpetration and indirect perpetration under article 25(3)(a). Further, and to the extent that the Chamber disagrees with the Pre-Trial Chamber's approach, the Prosecution invites the Chamber to state its interpretation of the confirmed modes of liability in the disposition of the Motion.

¹ [ICC-01/14-01/18-565-Red](#).

II. CONFIDENTIALITY

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“Regulations”), this Response is classified as Confidential because it contains classified information. A public redacted version will be filed in due course.

III. SUBMISSIONS

5. YEKATOM argues that the Confirmation Decision does not provide adequate notice because it does not set out the “constituent objective elements” of co-perpetration and its underlying facts.² He is incorrect. As noted, the Confirmation Decision and the charges described therein set out the precise forms of participation for which YEKATOM is charged, as well as the underlying facts. It thus meets the statutory notice requirements.

A. The Confirmation Decision sets out the precise modes of liability

6. The Confirmation Decision—and the charges against YEKATOM—comply with the Court’s legal framework.³ A confirmation decision sets out the parameters of the charges for trial.⁴ The charges are comprised of two elements: (a) the ‘material’ facts underpinning the alleged crimes (including contextual elements) and modes of liability (forms of participation);⁵ and (b) the legal characterisations of those facts.⁶

² YEKATOM addresses the objective elements of direct co-perpetration. YEKATOM does not argue that he did not receive notice of the subjective elements of co-perpetration or the elements of ordering. Hence, the Prosecution will not address these matters.

³ *Contra* [Motion](#), para. 27.

⁴ See [Chambers Practice Manual](#), para. 57; [Lubanga AJ](#), para. 124. See also [Bemba et al. AJ](#), para. 196; ICC-01/05-01/13-992 (“[Bemba et al. Auxiliary Documents Decision](#)”), para. 15; ICC-01/05-01/08-935 (“[Bemba Second DCC Decision](#)”), para. 12; ICC-01/09-01/11-522 (“[Ruto & Sang UDCC Decision](#)”), paras. 13, 18; [Bemba TJ](#), para. 32; ICC-01/05-01/08-836 (“[Bemba First DCC Decision](#)”), para. 37; ICC-01/04-01/07-1547-tENG (“[Katanga Summary Charges Decision](#)”), paras. 22-23.

⁵ See ICC-01/09-01/11-475 (“[Ruto & Sang Order Charges](#)”), para. 9; ICC-01/04-02/06-450 (“[Ntaganda UDCC Decision](#)”), para. 50; ICC-01/04-01/06-2205 (“[Lubanga Regulation 55 AD](#)”), fn. 163.

⁶ See [Ntaganda UDCC Decision](#), para. 37 (stating that “‘charges’ include a description of the relevant ‘facts and circumstances’, as well as a legal characterisation of the facts”); [Katanga Summary Charges Decision](#), para. 10 (noting that a ‘charge’ encompasses “a legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 of the Statute and the precise form of participation under articles 25 and 28 of the Statute”);

This is consistent with regulation 52(b) and (c) of the Regulations of the Court which require the Prosecutor to set out in the Document Containing the Charges (“DCC”):

(b) A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court;

(c) A legal characterisation of the facts to accord both with the crimes under articles 6, 7 or 8 and the precise form of participation under articles 25 and 28.

7. The Confirmation Decision complies with these requirements. It sets out the crimes under articles 6 and 7,⁷ and the precise forms of participation attributed to YEKATOM, *inter alia*, under article 25(3)(a) (direct co-perpetration and indirect perpetration), that is “committing the aforementioned crimes jointly with another or through another under article 25(3)(a) of the Statute”.⁸ Further, the Confirmation Decision details the factual allegations underlying the crimes, the forms of participation, and cross-references to the DCC where appropriate. Based on the foregoing, YEKATOM has received adequate notice of the nature, cause and content of the charges and can adequately prepare his defence.⁹

8. YEKATOM conflates co-perpetration (a form of participation set out in the Statute) with some Chambers’ approach of rehearsing previous jurisprudence when interpreting the relevant provision in the final judgments.¹⁰ Although this may be preferable in many cases, this practice is not required by the Statute in confirmation

[Ruto & Sang Order Charges](#), para. 9 (indicating that under Regulation 52, a charge should consist of statement of the facts and a legal characterisation of the facts).

⁷ ICC-01/14-01/18-403-Red-Corr (“[Confirmation Decision](#)”), pp. 104-107; *see also* paras. 93-97, 118-123, 138, 153.

⁸ [Confirmation Decision](#), p. 107; *see also* paras. 98-100, 124-125, 139-141, 154-156.

⁹ *See Bemba et al. AJ*, para. 185 (finding that the right of the accused under article 67(1)(a) to be duly informed of the “nature, cause and content” of the charges “includes information about the legal characterization of the charges”).

¹⁰ [Motion](#), paras. 22-23.

decisions. While a Pre-Trial Chamber must clearly identify the applicable modes (and the underlying material facts), it need not rehearse elements to the extent that arise directly from the ordinary meaning of the language of the Statute. Some provisions are self-explanatory and some facts are straightforward, and in those instances, no interpretation or rehearsal of the requisite elements is necessary to apply the law to the facts. The charges concerning YEKATOM on the basis article 25(3)(a), as confirmed, is exactly such a case.

9. The Confirmation Decision provides that YEKATOM committed the charged crimes “jointly with others” or “through other persons”. The language used is directly derived from the Statute. As described below, the Confirmation Decision clearly describes YEKATOM’s actions, his co-perpetrators, the physical perpetrators and the alleged crimes. YEKATOM does not require additional legal insight into article 25(3)(a) to prepare his case on the basis of which it was confirmed.

10. Further, YEKATOM’s suggestion that the Pre-Trial Chamber departed from the “joint control over the crime” theory is unsupported and, in any case, inapposite.¹¹ The Pre-Trial Chamber’s expression of doubt regarding the Court’s jurisprudence related very specifically to the compatibility of the notion of common plan with the Statute. However, being mindful of the Appeals Chamber’s jurisprudence the Pre-Trial Chamber noted that “the common plan may be *one* of the shapes taken by a criminal agreement”,¹² and expressly acknowledged that article 25(3)(a) envisages a “criminal agreement”.

11. YEKATOM’s case involves objectively criminal agreement(s), and the goal of those agreement(s), as described in the Confirmation Decision, was precisely the very perpetration of the charged crimes. Accordingly, any theoretical discussion on

¹¹ *Contra* [Motion](#), paras. 27, 33.

¹² [Confirmation Decision](#), para. 60 citing [Lubanga AJ](#) and (further noting that “despite its apparent ubiquity, the very compatibility of the notion of a common plan with the statutory framework and its usefulness vis-à-vis article 25 of the Statute is far from being a foregone conclusion”).

whether a common plan must have an element of criminality or be criminal simply does not arise. Moreover, since YEKATOM contributed directly to the crimes, the Pre-Trial Chamber's approach of "looking at [the suspects'] contributions in respect of each of the charged incidents" is consistent with his case.¹³ Hence, any debate on whether his contribution should be to a common plan or to the crimes is not only immaterial, but unnecessary for the purposes of informing him of the charges.

12. Thus, YEKATOM's submission that he has not received sufficient notice because the Confirmation Decision does not identify the "constituent objective elements" of co-perpetration should be dismissed.

B. The Confirmation Decision sets out the material facts underpinning co-perpetration

13. Likewise, YEKATOM's submission that the Confirmation Decision did not enter findings regarding "the contours" of the common plan, his essential contributions, and the identity of the alleged co-perpetrators should be dismissed.¹⁴ The Pre-Trial Chamber entered factual findings with respect to the elements of co-perpetration as confirmed namely, a criminal agreement to commit the charged crimes, YEKATOM's contributions to the crimes, and the identity of the co-perpetrators to the extent necessary.

¹³ [Confirmation Decision](#), para. 57. See also para. 59. *Contra* [Motion](#), para. 34. Notably the *Abu Garda* Pre-Trial Chamber (including Judge Tarfusser, whose separate opinion is relied upon by the Pre-Trial Chamber) endorsed the "joint control over the crime" theory: ICC-02/05-02/09-243-Red ("[Abu Garda CD](#)"), paras. 152-153, 159-162.

¹⁴ [Motion](#), paras. 24, 28, 30, 32.

- i. *YEKATOM and other Anti-Balaka jointly committed crimes: they agreed to violently target the Muslim civilian population in western CAR, and to enlist and conscript and use child soldiers under the age of 15*

14. The Confirmation Decision sets out the criminal agreement(s) among the co-perpetrators, and identifies them to the extent necessary. YEKATOM misunderstands the law and misapprehends the Confirmation Decision.

15. He disregards that an agreement need not be written or explicit, and can be inferred from circumstantial evidence, such as from the subsequent concerted action of the co-perpetrators committing the crimes.¹⁵ An agreement may be previously arranged, but it can also materialise extemporaneously.¹⁶ Further, the charges need not list all the co-perpetrators or identify them all by name. Some co-perpetrators may be identified by other features, such as their membership to or through their role that they play in the commission of crimes.¹⁷

16. YEKATOM further ignores the plain text of the Confirmation Decision. The Pre-Trial Chamber found that “[a]long with their primary and *per se* legitimate objective to overthrow the Seleka regime and oust them from the CAR, the Anti-Balaka also developed a criminal policy of targeting the Muslim population in western CAR”.¹⁸

17. It found that YEKATOM was a zone commander of an Anti-Balaka group who reported to and coordinated with NGAISSONA. He was in command of an active

¹⁵ [Lubanga TJ](#), paras. 984, 988; [Bemba et al. TJ](#), para. 66; [Lubanga CD](#), para. 345; [Kenyatta CD](#), para. 399; [Ruto CD](#), para. 301.

¹⁶ [Lubanga AJ](#), para. 445.

¹⁷ See [Katanga TJ](#), para.1626 (although for article 25(3)(d): “and the identity of the members of group, although each person need not be identified by name”); see also cf. [Ntaganda TJ](#), para. 808 (referring to “Mr Ntaganda and other military leaders of the UPC/FPLC, including Thomas Lubanga and Floribert Kisembo”) and [Brdjanin AJ](#), para. 430 (albeit for JCE: “[i]n establishing these elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved)”).

¹⁸ [Confirmation Decision](#), para. 64; see also para. 70. This finding was made in the section regarding contextual elements of crimes against humanity.

group of Anti-Balaka which at one point numbered 3,000 members, who were first located in Cattin, Boeing and Bimbo and, later on, in the Lobaye Prefecture along the Bangui-Mbaïki axis.¹⁹ YEKATOM fled to Zongo approximately one month after the Seleka coup d'état. He met regularly with Freddy Ouandjio, Habib Beina, among others.²⁰ After spending approximately one month in Zongo, YEKATOM crossed into the Lobaye Prefecture in the CAR where he communicated with others and agreed to participate in the 5 December 2013 Attack.²¹ YEKATOM organised Anti-Balaka elements at least in August 2013, training them together with Freddy Ouandjio and Habib Beina, and equipping them with weapons. YEKATOM indicated that the purpose of the training was to 'kill Muslims and Selekas'.²²

18. In preparation for the 5 December 2013 Attack, YEKATOM instructed his elements to, *inter alia*, 'kill Selekas and Muslims, even Central African Republic Selekas', 'attack the Muslims and break their houses', 'go to PK5 and find the Muslims and Seleka', and to 'destroy the Muslims [sic] houses so they will go back to their country'.²³ In the afternoon of 4 December, YEKATOM chose 1,000 of his bravest fighters and told them to move to Bangui and, once in 'Proget' (near the Bangui airport), he told them that they would attack "the Muslim and Seleka" at Boeing Market.²⁴

19. Consistent with the Anti-Balaka criminal policy, the Confirmation Decision specifies that during the 5 December 2013 Attack of Bangui, "Yekatom's group attacked the Boeing market, specifically targeting the shops owned by Muslims. Yekatom told the Anti-Balaka elements that the 'Arabs had many guns' and instructed them to 'shoot at the Muslims'. [YEKATOM], Freddy Ouandjio and Habib Beina were in the front of group and were shooting their AK-47 rifles. Between five

¹⁹ [Confirmation Decision](#), para. 65.

²⁰ [Confirmation Decision](#), para. 83.

²¹ [Confirmation Decision](#), para. 83.

²² [Confirmation Decision](#), paras. 84-85.

²³ [Confirmation Decision](#), para. 85.

²⁴ [Confirmation Decision](#), para. 86.

and thirteen Muslim shop owners were shot and then stabbed by Anti-Balaka elements”.²⁵ Following the attack on Boeing Market, [YEKATOM] and his elements moved to Catting where “the Anti-Balaka elements killed four Muslims”. While retreating from Catting to Boeing, the Anti-Balaka shouted that “they would kill [Djotodia] and then they would come back to kill all Muslims”.²⁶

20. A radio announcement referred to the attack and stated that “[l]es ANTI-BALAKA sont des Centrafricains pour aller libérer leur pays des jougs des djihadistes”²⁷. The Boeing mosque was also destroyed; YEKATOM ordered the attack and he was present during the destruction.²⁸ Following the attack, “nearly all the Muslim residents of Boeing and Catting fled to PK5, a predominantly Muslim neighbourhood in Bangui, other parts of the CAR or neighbouring countries”.²⁹

21. Further, at some point in December 2013, YEKATOM’s Anti-Balaka group established a base at the Yamwara School under YEKATOM’s control.³⁰ [REDACTED].³¹

22. Moreover, the Chamber found that “[f]ollowing the 5 December 2013 Attack and its aftermath, in January 2014, [YEKATOM’s] Anti-Balaka group advanced through and took over numerous villages in the Lobaye Prefecture and set up various checkpoints in the region. During this timeframe, Anti-Balaka members threatened or harassed Muslims in the region. [...] the Muslim individuals in Cattin and Boeing were displaced. [YEKATOM’s] Anti-Balaka group continued this pattern of crimes and threats in the Lobaye Prefecture, where many Muslims fled their villages in fear; nearly all Muslims in Mbaïki were evacuated by Chadian forces. Subsequently, a group of individuals, including members of the Anti-Balaka, killed

²⁵ [Confirmation Decision](#), para. 87.

²⁶ [Confirmation Decision](#), para. 88.

²⁷ [Confirmation Decision](#), para. 90.

²⁸ [Confirmation Decision](#), para. 91.

²⁹ [Confirmation Decision](#), para. 92.

³⁰ [Confirmation Decision](#), para. 113.

³¹ [Confirmation Decision](#), paras. 114-116.

[...], one of the few remaining Muslims in Mbaïki. Accordingly, [...] the actions of the Anti-Balaka constituted a continuation of its targeting of the Muslim population in retribution for the crimes and abuses committed by the Seleka, based on their religious or ethnic affiliation. [...] Yekatom was present in the areas under his control during the relevant time period, and that he was in control of the established checkpoints”.³²

23. Finally, the Chamber found that children joined the ranks of the Anti-Balaka both by force and voluntarily.³³ They were present in several locations under YEKATOM’s control or where YEKATOM was present, including checkpoints and barricades established by his elements.³⁴ They carried out a variety of tasks (such as messengers or spies, operating checkpoints [REDACTED]) and participated in hostilities.³⁵

24. The findings depicted above demonstrate that the Confirmation Decision clearly sets out the material facts describing the co-perpetrators (YEKATOM and other members of his Anti-Balaka group such as Freddy Ouandjio and Habib Beina) and their agreement(s) to target the Muslim population in western CAR, and to recruit and use child soldiers under the age of 15.

ii. YEKATOM committed the crimes pursuant to article 25(3)(a)

25. Further, the Confirmation Decision clearly describes YEKATOM’s commission of the crimes. That the Pre-Trial Chamber did not expressly define his contributions as “essential” is not determinative; what is relevant is that YEKATOM’s conduct—clearly set out in the Confirmation Decision—falls within the terms of article 25(3)(a) as subsumed in the ordinary meaning of the language of the provision, and

³² [Confirmation Decision](#), para. 139; *see also* paras. 129-137.

³³ [Confirmation Decision](#), para. 147.

³⁴ [Confirmation Decision](#), para. 146.

³⁵ [Confirmation Decision](#), paras. 148-149.

adequately elaborated by the Pre-Trial Chamber. To this extent, the factual findings in the Confirmation Decision unquestionably show that YEKATOM *led* his Anti-Balaka group in the commission of the charged crimes.

26. In the case of child soldiers, the Pre-Trial Chamber found that YEKATOM directly contributed to the perpetration of the crimes by, for instance, (i) using children, including those under 15 years of age to assist him at the camp bases; (ii) giving orders for children to be stationed at barriers and checkpoints; and (iii) giving orders for children to actively participate in hostilities, including in the 5 December 2013 Attack on Bangui.³⁶

27. In respect of the other crimes, it found that YEKATOM contributed to them by, for instance: (i) structuring, training and equipping his Anti-Balaka elements; (ii) preparing the Anti-Balaka attacks and advances, and participating and leading his group in the execution of these attacks and advances; and (iii) issuing orders to Anti-Balaka members, including patently illegal instructions, such as to commit the crimes.³⁷

28. As such, the Confirmation Decision sets out in a clear and specific manner all the material facts underpinning co-perpetration as required.

C. The Chamber should confirm that YEKATOM stands charged as direct co-perpetrator and indirect perpetrator

29. Nonetheless, considering the importance of the issues raised in the Motion, the Prosecution respectfully requests that the Chamber confirm the understanding of the Confirmation Decision advanced in this response. The Prosecution further requests that the Chamber find that the Confirmation Decision *at a minimum* permits the case

³⁶ [Confirmation Decision](#), para. 154; *see also* p. 107 (iv).

³⁷ [Confirmation Decision](#), p. 107 and paras. 86-92, 94, 98, 113-117, 124, 129-137, 139.

to proceed against YEKATOM on the basis of direct co-perpetration and indirect perpetration under article 25(3)(a).

30. Further, the Prosecution notes that a Trial Chamber is not bound by, and may depart from, the Pre-Trial Chamber's interpretation of the law as long as it does not exceed the facts and circumstances set out in the charges.³⁸ Hence, to the extent that the Chamber would interpret the confirmed modes of liability differently, the Prosecution invites the Chamber to do so before the start of the trial. The Prosecution considers that this Chamber—and eventually the Appeals Chamber—should definitively settle the issues raised by YEKATOM *before* the trial proceeds.

IV. CONCLUSION

31. For the foregoing reasons, the Prosecution requests that the Chamber dismiss the Motion and confirm that the Confirmation Decision properly charges YEKATOM with direct co-perpetration and indirect perpetration. To the extent that the Chamber disagrees with the Pre-Trial Chamber's approach or with the position advanced herein, the Prosecution invites the Chamber to state its own interpretation of the law.



Fatou Bensouda, Prosecutor

Dated this 6th day of July 2020
At The Hague, The Netherlands

³⁸ See e.g. [ICC-02/04-01/15-428](#), para. 31 (“the Defence can raise at trial the matter of the proper interpretation of article 25(3)(c) of the Statute as the Trial Chamber is not legally bound to follow the Chamber’s interpretation in the Confirmation Decision”); [ICC-01/12-01/18-498-Red2](#), paras. 36-37.